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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 435

HARRIS TRUCK LINES, INC., A CORPORATION,
Petitioner,

vs.

CHERRY MEAT PACKERS, INC., A CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

HARLAN L. HACKBERT,
EUGENE H. RUARK,
208 South LaSalle Street,
Chicago 4, Illinois.

JOSEPH E. BELL,
105 South LaSalle Street,
Chicago 3, Illinois,
Attorneys for Petitioner.

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Harris Truck Lines, Inc., prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case on May 10, 1962, on which judgment rehearing was denied on June 21, 1962.

CITATIONS TO OPINIONS BELOW.

The only opinion involving the question on which certiorari is sought is the opinion of the court of appeals printed in Appendix A hereto, *infra*, p. 21, which is reported at 303 F. 2d 609.

JURISDICTION.

The judgment of the court of appeals was entered on May 10, 1962. (Appendix A, *infra*, p. 25.) Rehearing was denied on June 21, 1962. (Appendix A, *infra*, p. 26.) The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether a notice of appeal is timely when filed less than 60 days after entry of judgment and when filed in reliance on an extension of time under Rule 73(a), F. R. Civ. P., granted by the district court less than 30 days after the entry of judgment.

2. Whether the inability of counsel employed only to try the case to advise forwarding counsel of the entry of judgment because of such forwarding counsel's absence from the country constitutes a sufficient showing of "failure of a party to learn of the entry of the judgment" to sustain an extension of the time for appeal granted less than 30 days after the entry of judgment.

3. Whether a party learns of the entry of judgment within the meaning of Rule 73(a) when such party actually learns thereof or whether the requirement is satisfied by notice to counsel of record not, in fact, conveyed to the party.

4. Whether the granting of an extension of time for filing a notice of appeal, under Rule 73(a), within 30 days of the entry of judgment, is reviewable de novo in the court of appeals, or is reviewable only for abuse of discretion, or under the "clearly erroneous" rule.

5. Whether the conclusion of the court of appeals that no showing of "excusable neglect based on a failure of a party to learn of the entry of judgment" had been made in

the district court so as to justify a 14-day extension of time for filing notice of appeal, warranted dismissal of the appeal for want of jurisdiction.

FEDERAL RULE INVOLVED.

Rule 73(a) of the Federal Rules of Civil Procedure is the Rule involved, and is set forth in Appendix E, *infra*, p. 37. The relevant portion of Rule 73(a) is:

> "Rule 73 * * *
>
> (a) When and How Taken. When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, * * * except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed * * *"

Section 2107 of the Judicial Code (28 U. S. C. § 2107) is a parallel provision, although it contains no specific provisions as to the motions which terminate the running of the time for appeal.

STATEMENT.

Petitioner Harris Truck Lines, Inc., an interstate motor carrier then having its principal place of business in Los Angeles, California, filed suit against Cherry Meat Packers, Inc., in the district court at Chicago in April, 1957. It invoked the jurisdiction of the court under 28 U. S. C. § 1337 and claimed that it had been underpaid on the carriage of approximately 40 separate shipments of sausage in violation of the Interstate Commerce Act. Cherry Meat Packers counterclaimed, alleging that one of the shipments was spoiled in transit from Chicago to San Diego, Cali-

fornia in violation of the carrier's duty. The case came to trial without a jury in February, 1960 and resulted in a finding by the district judge in favor of Cherry Meat Packers on its counterclaim. The findings of the district court, however, made no reference to any factual or legal element of the claim, being solely the findings proposed by Cherry Meat Packers which were devoted exclusively to the counterclaim. (Pl. App. 209-211.) A motion for a new trial was timely filed and on June 28, 1961, one year and four months after the trial, the motion was finally denied. (Pl. App. 214.)

During the period following the original filing of this action, Harris Truck Lines had ceased active operations and was in the process of dissolution. In 1960 the corporation had assigned its operating rights to another motor carrier and conducted no business thereafter. The corporation remained in existence at the time of the denial of the motion for a new trial. However, its officers had obtained other full-time employment and the corporation no longer maintained a business office, and had no employees or telephone. (Appendix C, *infra*, pp. 31, 32.) The officers of Harris Truck Lines resided in various parts of Southern California, including the general counsel, Mr. Jack O. Goldsmith. (Appendix D, *infra*, p. 34.) Mr. Goldsmith had been given blanket authority to act on behalf of the corporation in winding up its affairs, including the conduct and disposition of all litigation. (Appendix C, *infra*, p. 31.) Mr. Goldsmith, who is also a practicing attorney in Los Angeles, had retained counsel in Chicago for the trial of the present lawsuit.

Upon being notified by the district court that the motion for a new trial had been denied, trial counsel sought to inform Mr. Goldsmith in Los Angeles, requesting advice on whether to appeal. However, counsel was told by a sec-

retary that Mr. Goldsmith was touring in Mexico and would not return until July 21, 1961.

Nearly two weeks of the 30 days provided in Rule 73(a) for filing a notice of appeal had then elapsed and no qualified representative of the corporate party had been notified of the denial of the motion for a new trial. Counsel thereupon prepared a motion to extend the time for filing the notice of appeal, served counsel for Cherry Meat Packers and appeared for hearing before the emergency judge on July 13, 1961, fifteen days before the time for filing a notice of appeal would have expired without any extension. Counsel informed the district court that the matter before it was the only one he had ever handled for Harris Truck Lines, that Mr. Goldsmith was touring in Mexico, and that he would need time in addition to the original thirty days to be instructed whether to appeal. The district judge extended the time for two weeks until August 11, 1961. (Appendix B, *infra*, p. 30.) Thereafter Mr. Goldsmith returned to this country, learned of the entry of judgment and engaged new counsel to determine whether an appeal should be taken. The new counsel examined the district court docket, noted the extension of time granted and, in reliance thereon, filed the notice of appeal within the extension of time granted.

Harris Truck Lines perfected the appeal, received three extensions of time for filing its brief and appendix pursuant to stipulations by Cherry Meat Packers and completed filing on December 20, 1961. Cherry Meat Packers' brief was due on January 19, 1962 but two days before that date Cherry Meat Packers, for the first time, moved to dismiss the appeal on the ground that the extension of two weeks for filing the notice of appeal granted six months previous should not have been granted and therefore, the notice of appeal was filed out of time. Briefs were filed by both parties and Harris Truck Lines filed affidavits of Mr.

Goldsmith and of Mr. Harold Mendenhall, Vice President of the corporation, in support of its opposition to the motion to dismiss. Two weeks later, the court of appeals entered the following order:

• • •

> "IT IS HEREBY ORDERED that the said motion to dismiss appeal be, and the same is hereby denied.
>
> "IT IS FURTHER ORDERED that the request of plaintiff-appellant that the defendant-appellee be ordered to file its brief on the merits be granted, and defendant-appellee is hereby ordered to file its brief on the merits within thirty (30) days from this date." (Appendix A, *infra*, p. 27.)

Counsel for petitioner next learned that the issue of the timeliness of the filing of the notice of appeal remained in the case when he was so advised by the court when he arose to present oral argument. The decision of the court of appeals on May 10, 1962, in which the opinion was written by the same judge who entered the order of January 31, was concerned solely with the question of timeliness of the filing of the notice of appeal. (Appendix A, *infra*, pp. 21-24.) A petition for rehearing was denied without opinion.

All of the factual matter relating to the propriety of the extension has been placed in appendices to this petition. (Appendix B—Transcript of Proceedings had at hearing of July 13, 1961; Appendix C—Affidavit of Harold Mendenhall; Appendix D—Affidavit of Jack Oliver Goldsmith.) So far as petitioner is aware, there is no issue as to the facts there stated or set forth.

REASONS FOR GRANTING THE WRIT.

1. This decision of the court of appeals raises an important, but undecided, issue in the day-to-day application of the Federal Rules of Civil Procedure. The effect of the decision is to place limits on the authority and discretion of the trial judge to grant an extension of time for filing a notice of appeal not contemplated by Rule 73(a) and contrary to the spirit and principle of other cases decided under the rule.

2. To the extent that the present case and *Hoyard* v. *Local 74, etc.*, 208 F. 2d 930 (1953) can be said to represent the Seventh Circuit view as to the scope of review of Rule 73(a) orders concerning extension of time for filing notice of appeal, this view conflicts with the deference accorded the trial judge's decision by other circuits considering the question.

3. The decision of the court of appeals raises questions as to the scope of federal appellate review which call for the exercise of this Court's supervisory powers over judicial administration:

(a) the court of appeals reviewed a procedural action of the district court as a question to be decided by the court of appeals without giving weight to the previous determination of the district judge,

(b) by considering de novo the question of whether counsel had made the necessary factual showing for an extension under Rule 73(a), the court of appeals treated the issue as a "jurisdictional fact" for its own decision, although there is no justification for importing such a rule (if it still exists) from the field of administrative law,

(c) the court of appeals' treatment of the factual showing as jurisdictional resulted in the final

dismissal of the action without an opportunity for a decision on the merits of the case, contrary to the spirit of the Federal Rules of Civil Procedure,

(d) the court of appeals failed to follow its own rule or to give any weight to (or even to indicate that it considered) its own prior ruling on the same issue and the facts adduced in the course of such ruling,

(e) the court of appeals not only erroneously reviewed the facts as in an original hearing, but reached an incorrect and implausible decision on those facts.

ARGUMENT.

1. Petitioner believes that it has been the unhappy participant in a case without parallel under the Federal Rules of Civil Procedure. By prevailing in what appeared to be a somewhat routine procedural motion, petitioner now finds that its appeal has been dismissed without any consideration of the merits of its case. Had petitioner's motion been denied, a timely notice of appeal could still have been filed and the case ultimately resolved on its merits.

How did the strange result of losing by winning come about? Through appellate review of a district court ruling under Rule 73(a), F.R. Civ. P. at marked variance with the deference usually accorded rulings of a district judge on procedural matters and, more particularly, on Rule 73(a) orders concerning extension of time for filing a notice of appeal.

The court of appeals reviewed de novo the question of whether a sufficient factual showing had been made to the district court to justify an extension of time under Rule 73(a). A negative conclusion on the showing question, it then reasoned, deprived it of jurisdiction and required dismissal of the appeal.

The issue is the extent to which Rule 73(a) may properly be treated as jurisdictional, a question which, in the nature of federal appellate practice, merits resolution by this Court.

There is no doubt but that there are two underlying jurisdictional principles embodied in Rule 73(a):

(1) no extension to file the notice of appeal may be granted or may extend the date of filing more

than 60 days after the action of the district court becomes final, the district court being absolutely without jurisdiction at the expiration of the 60-day period,

(2) 30 days after the action of the district court becomes final, the district court "conditionally" loses jurisdiction, subject only to its right to extend the period for filing the notice of appeal up to the 60-day limit where the necessary showing of "excusable neglect" has been made.

All of the cases supporting the court of appeals opinion are applications of these two "jurisdictional" principles. In each case (and in every other reported case concerning Rule 73(a)), an extension was not sought until after the original 30 days for appeal of right had run and appellant was absolutely barred from appeal without the grant of an extension by the district court. That is not the present case. Rather, the question here is the extent of the trial court's discretion to grant an extension of time during the original 30-day period when a party still has an absolute right to file a notice of appeal and the district court retains its power over the case and the parties.

The distinctions between applications filed in the two periods are manifest. Within the original 30-day period, an extension can be granted without notice or motion, but cannot be granted *ex parte* in the second 30-day period. *North Umberland Mining Co. v. Standard Accident Insurance Co.*, 193 F. 2d 951 (9th Cir. 1952); *Cohen v. Plateau Natural Gas Company*, 303 F. 2d 273 (10th Cir., May 1, 1962). Within the first 30-day period, counsel for a would-be appellant has the alternative course to which there is an absolute right (without regard to his authorization), of simply filing the notice of appeal—an even less difficult

act than appearing before the district judge.[1] The existence of the alternative right and the ability of counsel to appear without notice to his opponent make sense under only one construction of Rule 73(a). Namely, that the district court has a broader discretion in granting such motions for extension during the period initially prescribed for filing the notice of appeal than it does after the expiration of the 30-day period for filing a notice of appeal. This same distinction is made by Rule 6(b), F. R. Civ. P.[2]

No other case can be found in which a court of appeals has been willing to consider a contention that a filing within the 60-day period predicated upon an extension granted within the first 30-day period is not timely. It is the firm conviction of petitioner that the reason that there are no cases dealing with the specific point—the district court's power within the first 30 days after entry of judgment to extend the time for appeal up to a full 60 days upon such showing under Rule 73(a) as the court deems necessary—is that until now it had been uniformly conceded to be within the district court's discretionary jurisdiction.[3]

1 As Judge Hoffman commented at the hearing which resulted in the grant of extension of time: "All counsel has to do is go down to the second floor and file a notice of appeal. It doesn't require a great amount of effort." (Appendix B, *infra*, p. 29.) *See, Conway v. Greyhound Lines, Inc.*, 243 F. 2d 39, 40 (D. C. Cir. 1957).

2 Rule 6(b) provides, in part: "* * * the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect * * *." Rule 6(b) is set out at Appendix E, *infra*, p. 38.

3 The only like factual situation is *Second Nat. Bank of New Haven v. Harris*, 122 Conn. 180, 187 Atl. 910 (1936) where a state court found the facts to be that, "within the time allowed by the rules for an appeal, the defendants' attorney made a motion that the time for appeal be extended on the ground that they (defend-

The court of appeals relied primarily upon its earlier decision in *Howard v. Local 74, etc.*, 208 F. 2d 930 (7th Cir. 1953), in which it reversed the granting of an extension under Rule 73(a). The case is marked principally by its dissimilarities to the case at bar. For example, in *Howard*:

(1) a notice of appeal had been filed 32 days after the district court's judgment became final and was concededly untimely,

(2) 58 days after the judgment had become final, the district court granted a motion to withdraw the original notice and granted an extension of time to file a new notice of appeal up to the 60-day limit,

(3) the case was a class action in which the contention of appellants was that non-representative persons within the class had not learned of the entry of judgment,

(4) the argument of lack of jurisdiction was made to the trial judge, who responded, "I will let the higher court decide that one too." (208 F. 2d at 933.)

What, to petitioner, is even more unfortunate is that *Howard* implicitly recognizes the distinctions which are here urged. For example, the court there noted that "the trial court's decision was not based on a factual determination" and "we have no question as to whether the lower court's findings support the order but are dealing

ants] were in Florida and it would take time to communicate with them concerning an appeal and that a copy of the record might be necessary." The Supreme Court of Errors denied a motion to dismiss, saying, "the reasons for seeking the extension were such as would amply justify the action of the trial judge in granting further time, and the plaintiff does not assert that they were not in fact true."

with an order issued expressly to let 'the higher court,' decide the 'complicated' question." (208 F. 2d at 932, 933.)

2. This Court has taken jurisdiction in the past to affirm the basic concept of liberal construction and application of the Federal Rules of Civil Procedure, including questions analogous to Rule 73(a). *State Farm Mutual Automobile Insurance Company v. Palmer*, 350 U.S. 944 (1956.) (Relationship of rule 54(b) to Rule 73(a).) The technical construction of the Federal Rules in the present case has deprived petitioner of an opportunity for a decision on the merits of its contentions, in contravention of the principle of liberal construction upon which the Rules were grounded and the frequent injunction of the courts that litigation is to be disposed of on the merits, rather than by collateral attack. *Mitchell v. White Consolidated, Inc.*, 177 F. 2d 500, 502 (7th Cir. 1949); *Burnstein v. Columbia Broadcasting System, Inc.*, 291 F. 2d 8 (7th Cir. 1961). We say "amen" to Judge Reyes' recent words that "the Federal Rules are not intended to create procedural traps for the parties." *Blanchard v. Commonwealth Oil Company*, 294 F. 2d 834, 837 (5th Cir. 1961).

3. Moreover, a grant or denial of leave to file a notice of appeal within any part of the 60-day period pursuant to authorization of the district court under Rule 73(a) is reviewable at most for abuse of discretion. *Nichols-Morris Corp. v. Morris*, 272 F. 2d 586 (2d Cir. 1959); *Southern R. Co., v. Wilson*, 213 F. 2d 870 (4th Cir. 1954).

The court of appeals, however, apparently chose to treat the questions of whether "excusable neglect" or "failure of a party to learn of the judgment" existed as

"jurisdictional facts," subject to its de novo redetermination at any stage of the appeal.[4]

There is no precedent for borrowing such a doctrine from cases which have grown up around the review of decisions of administrative agencies. In any event the *Crowell* v. *Benson* rule (*Crowell* v. *Benson*, 285 U. S. 22 (1932)) has been so limited by subsequent cases such as *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938); *National Labor Relations Board* v. *Hearst*, 322 U. S. 111 (1944) and *Estep* v. *United States*, 327 U. S. 114 (1946) (concurring opinion of Mr. Justice Frankfurter at p. 142) that this Court should not sanction an extension of this doctrine into a new field.

Put in the light most unfavorable to petitioner, the ruling of the trial judge should only have been considered under the standard provided by Rule 52(a), F. R. Civ. P., to determine whether the grant of extension of time was "clearly erroneous." No such determination was made. Where, as in the present case, the factual showing of "excusable neglect" did not have to be made as a prerequisite to any jurisdiction of the district judge to enter an order, the necessary quantum of "showing" is a factual one peculiarly for the trial judge. No other case has suggested that a different and broader scope of review applies to Rule 73(a) orders than to other procedural motions.

4. Although there is no hint of it in the court of appeals' opinion, the self-same question was decided in favor of petitioner by Judge Castle, author of the later opinion, on January 31, 1962. At that time, the court of appeals was fully advised as to the factual background which was presented by the two affidavits of Goldsmith

4. Judge Castle's opinion found that "the District Court was *without jurisdiction* to enter the extension it did" (emphasis added) (Appendix A, *infra*, p. 24), a conclusion which otherwise has no meaning as to action taken by the district court within the original 30-day appeal period.

and Mendenhall. (Appendix C and Appendix D, *infra*, pp. 31-36.) No counter-affidavits were filed. Briefs were filed by both parties. There is no doubt that an order entered under such circumstances is *res judicata* of the issue. *Baldwin v. Traveling Men's Association*, 283 U. S. 522 (1931).

The affidavits filed with petitioner's opposition to respondent's motion to dismiss make clear that which was obviously understood by the trial court—that Jack O. Goldsmith, referred to as "co-counsel" (Appendix B, *infra*, p. 29), was an officer of the corporate party, the officer who had the authority to authorize an appeal, and he was outside of the country and could not be reached. It is hard to imagine a set of facts which more clearly justifies the granting of an extension for time for taking an appeal. Petitioner reiterates that it knows of no contention that these facts do not exist.

5. Rule 15(f) of the Rules of the United States Court of Appeals for the Seventh Circuit states:

> (f) JURISDICTIONAL QUESTIONS. Whenever it appears that there is a substantial jurisdictional question in a cause pending an appeal, such question may be raised by either party by motion, to determine the issue as to jurisdiction in advance of hearing on the merits. Such motion shall be made as soon as possible, and when such motion is filed, all further proceedings shall be held in abeyance without further order until our disposition thereof has been made.

The court of appeals acknowledges that this rule was violated by respondent. It attempts to explain away the rule by saying that a violation "cannot have the effect of conferring jurisdiction upon this Court." (Appendix A, *infra*, p. 24.) No doubt this is correct, but such rule is necessarily limited to jurisdictional aspects which are not subject to waiver (generally speaking, jurisdiction over the

subject matter). Rule 12(h), F. R. Civ. P.; *Orange Theatre Corp.* v. *Rayherstz Amusement Corp.*, 139 F. 2d 871, 874 (3d Cir. 1944), certiorari denied, 322 U. S. 740 (1944) (defense of lack of jurisdiction over the person must be asserted "promptly"); *Gavin* v. *Hudson & Manhattan R. Co.*, 185 F. 2d 104 (3d Cir. 1950) (lack of jurisdiction over the subject matter cannot be waived). To apply the statement indiscriminately to all types of jurisdictional issues turns the rule into no more than a pious hope, since the court would then be required to give full consideration to any jurisdictional issue, no matter when raised. Had petitioner filed its notice of appeal outside the 30-day limit without an order of court, the matter might have been jurisdictional in the sense referred to by the court of appeals. A filing which, on its face, satisfies the jurisdictional requisites is not such a matter of absolute jurisdiction and appellee never sought to explain its 6-month silence.

6. The court of appeals reached two conclusions which petitioner believes are themselves clearly erroneous. The first is its conclusion that Goldsmith could not be deemed to be a party, so that the question of whether he learned of the judgment was not pertinent to the question of "excusable neglect." (Appendix A, *infra*, p. 23.) Where a corporate party is involved, it can only "learn" of a judgment or of anything else through its human representatives. *Steelco Stainless Steel* v. *FTC*, 187 F. 2d 693 (7th Cir. 1951). Goldsmith was an officer of the corporation and, more particularly, the officer in whom had been vested all authority with respect to pending litigation. (Appendix C, *infra*, p. 31.) Since Rule 73(a) is intended to place knowledge of the entry of judgment in the hands of the persons who can authorize an appeal, no person could more clearly have been the "party" than Goldsmith.

Apart from the particular facts of this case (in which

principal counsel was also an officer of the corporate party) the opinion overlooks a number of other cases in which courts have considered counsel not of record as equivalent to a "party", for purpose of Rule 73(a). *Dyer* v. *McDougall*, 109 F. Supp. 444 (E. D. N. Y. 1952); *Resnick* v. *Lehigh Valley R. Co.*, 11 F. R. D. 76 (S. D. N. Y. 1951); *Fowler* v. *Dodson*, 22 F. R. D. 4 (E. D. Pa. 1958).

The court of appeals also equated "notice" sent to attorneys under Rule 5(b), F. R. Civ. P. with learning of the entry of judgment required by Rule 73(a). There is, of course, a vital difference between notice and learning (or knowledge) since notice may be imputed where there is no actual knowledge.[5] Since actual knowledge is a condition precedent to filing a notice of appeal, Rule 73(a) is cast in terms of learning of the entry of judgment, rather than a more limited "receiving notice" of the entry of judgment. Thus, notice not coupled with actual knowledge does not make Rule 73(a) unavailable to a party seeking an extension of time for filing notice of appeal.[6]

The court's view that notice to the attorney is sufficient to show that the party learned thereof is incorrect, as a matter of principle, where the attorney lacks authorization to proceed with an appeal. A supposed imputation of knowledge from agent to principal should not apply where the attorney is unable to impart this knowledge to his client, particularly where the inability is known. This reasoning is approved by the Restatement, Agency 2d (1959), §268, comment d.[6] The *Howard* case also distin-

5. A quotable statement of this rule is, "'[k]nowledge' and 'notice' are not synonymous, for that which does not amount to actual notice may constitute notice 'and] a party may be charged with notice while in utter ignorance of that of which he is presumed to be advised." *Rosenbager* v. *Hawker*, 127 Iowa 521, 103 N. W. 781 (1905).

6. The comment states, in part, "... if the agent fails to transmit the information because of forgetfulness or because the means

guishes between "notice" and "actual notice." (208 F. 2d at 934.)

7. Because the matter was erroneously treated as being jurisdictional, it follows that the remedy of dismissal adopted by the court of appeals is also erroneous. If the court of appeals was dissatisfied with the showing which was made before the district judge, it should have remanded the cause to the district court for a further hearing at which an additional showing could be made by petitioner. There is discretion in the court of appeals to make such a remand under 28 U. S. C. § 1653. *Keene Lumber Co. v. Leventhal*, 165 F. 2d 815, 819 n. 2 (1st Cir. 1948).

Therefore, petitioner believes that there have been raised issues in the interpretation of the Federal Rules of Civil Procedure which merit the exercise of this Court's jurisdiction:

1. Because the motion for extension of time for filing the notice of appeal was filed and acted upon at a time when the district court retained jurisdiction over the action and when petitioner could have filed a notice of appeal of right, the granting of an extension of time so long as it purports to be made under Rule 73(a) and does not transcend the 60-day appeal period, is a matter within the broad discretion of the trial judge.

2. Thus, the court of appeals erred in:

(a) equating the case with those in which there was either no colorable jurisdiction or in which the extension of time was not granted as a substitute for an absolute right to appeal,

(b) treating the question of showing of "excusable neglect" as a jurisdictional fact to be retried by

adopted by him are not adequate, either with or without his own fault, the principal is not responsible in an action in which a consciousness of the fact not revealed is a necessary element."

it rather than adopting the general rule of "abuse of discretion" applied in procedural motions or, at most, the "clearly erroneous" test.

(c) treating the matter as jurisdictional so as to require dismissal of the complaint rather than remanding the cause for the taking of proofs as to the existence of the statutory requisites.

3. In re-evaluating the facts, the court of appeals reached a conclusion which was itself clearly erroneous.

CONCLUSION.

For the foregoing reasons the writ of certiorari should be granted.

Respectfully submitted.

HARLAN L. HACKBERT,
EUGENE H. REARK,
208 South LaSalle Street,
Chicago 4, Illinois.

JOSEPH E. BELL,
105 South LaSalle Street,
Chicago 3, Illinois,
Attorneys for Petitioner.

APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

September Term, 1961—April Session, 1962.

No. 13517
Harris Truck Lines, Inc.,
Plaintiff-Appellant,
vs.
Cherry Meat Packers, Inc.,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

May 10, 1962.

Before DUFFY, KNOCH and CASTLE, *Circuit Judges.*

CASTLE, *Circuit Judge.* This appeal involves a suit brought in the District Court by Harris Truck Lines, Inc., plaintiff-appellant, to recover freight charges alleged to be due it from Cherry Meat Packers, Inc., defendant-appellee. Defendant's answer denied the indebtedness and asserted a counterclaim for damages allegedly sustained by reason of the negligence of the plaintiff in failing to provide adequate refrigeration for frozen meat shipped by defendant. Plaintiff's answer to the counterclaim denied its failure to provide adequate refrigeration, averred lack of negligence on its part, and alleged that whatever damage occurred was attributable to the condition of the

meat when delivered for shipment, to the inherent nature of the shipment, and to the action of the defendant.

The cause was tried without a jury. The District Court dismissed plaintiff's complaint and entered judgment for defendant on its counterclaim. A motion by the plaintiff for a new trial was denied June 28, 1961. On July 13, 1961, in the absence of the trial judge an emergency judge sitting during the summer recess entered an order, on the motion of plaintiff's attorney of record, that the time within which plaintiff might file a notice of appeal was extended to August 11, 1961. Plaintiff's notice of appeal was filed on that date.

A crucial and threshold issue presented for our determination is whether plaintiff's notice of appeal was timely filed so as to give this Court jurisdiction. And, resolution of that issue depends upon whether the District Court had jurisdiction, under the facts and circumstances disclosed by the record before it, to grant the extension it did.

The time requirement within which an appeal must be taken is mandatory and jurisdictional. *Ray, et al. v. Morris, et al.*, 7 Cir., 170 F. 2d 498; *Marten v. Hess, et al.*, 6 Cir., 176 F. 2d 834, 835. In the instant case the applicable statute and rule (28 U.S.C.A. § 2107 and Rule 73(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A.) fixed the time within which notice of appeal was required to be filed as 30 days from the order denying plaintiff's motion for a new trial except that "upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment" the District Court is authorized to extend the time for appeal not exceeding 30 days from the expiration of the original time prescribed.

In *Howard v. Local 74, Etc.*, 7 Cir., 208 F. 2d 930, this Court in dismissing an appeal had occasion to observe (p. 932):

"Thus, it is clear that a lower court has jurisdiction

> to extend the time for appeal only if a basis for that jurisdiction is found within the express provisions of Rule 73(a), *viz.*, a showing of 'excusable neglect based on a failure' of a party to learn of the entry of the judgment."

With these principles in mind we turn to consideration of the facts and circumstances, as disclosed by the record before the District Court, upon which the extension was granted. There is no question that plaintiff's attorney of record in the trial court action had notice of the entry of the judgment sought to be appealed from and of the order denying a new trial. Plaintiff's motion for extension was grounded on the assertion that a Los Angeles, California, attorney, not an attorney of record in the cause but described as "co-counsel," had gone on a vacation before learning of the denial of the motion for a new trial and would not return to his office until July 21, 1961. At the hearing on the motion for an extension of time for appeal plaintiff's trial court counsel advised the court that "this is the only matter we have ever had from Harris Truck Lines. It was sent to us by Jack Oliver Goldsmith, a Los Angeles attorney. Judge LaBuy found against the plaintiff-counter defendant, and we advised Mr. Goldsmith of that. Then we filed a motion for new trial, and before the denial of Judge LaBuy on our motion for new trial, Mr. Goldsmith went on a vacation to Mexico."

Whatever the relation of Goldsmith to the plaintiff he was neither a "party" to the cause nor an attorney of record therein. He was not entitled to notice and conceding that he lacked knowledge of the denial of the motion for a new trial it is of no avail to plaintiff. No showing was made that Harris Truck Lines did not learn of the entry of the judgment and of the order denying a new trial. There was but an assertion of counsel that a "co-counsel" not of record in the cause had gone on a

vacation before denial of the motion for a new trial and would not return until July 21, 1961. Neither the motion for extension nor any of the assertions made at the hearing (no testimony or evidence was adduced in support of the motion) support a finding or conclusion that the plaintiff was unaware of the entry of the judgment or of the order. And such a showing is a mandatory prerequisite to the District Court's jurisdiction or authority to grant an extension of the time for appeal.

Moreover, notice to plaintiff's attorney of record of the judgment and of the denial of the motion for a new trial constituted notice to the plaintiff. Rule 5, Federal Rules of Civil Procedure (28 U.S.C.A.); *Howard* v. *Local 74, Etc., supra.* No showing was made before the District Court that would justify an exception to the general principle, recognized by Rule 5, that notice to counsel of record is notice to the party he represents.

We conclude that the District Court was without jurisdiction to enter the extension it did and that therefore plaintiff's notice of appeal was not timely filed. Consequently, this Court is without jurisdiction except to dismiss the appeal.

Plaintiff asserts that defendant's belated challenge to jurisdiction made subsequent to the filing of plaintiff's brief (which brief was filed pursuant to extensions of time agreed to by the defendant) violates Rule 15(f) of this Court which requires that a motion raising a jurisdictional question in a cause pending on appeal "shall be made as soon as possible". But a violation of that rule cannot have the effect of conferring jurisdiction upon this Court. It does, however, in the instant case justify the imposition of costs against the defendant-appellee. Cf. *Jarecki* v. *Whetstone*, 7 Cir., 192 F.2d 121, 124-125.

Plaintiff's appeal is dismissed but costs are assessed against the defendant-appellee.

APPEAL DISMISSED.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

Chicago 10, Illinois.

Thursday, May 10, 1962.

Before:

Hon. F. Ryan Duffy, Circuit Judge.
Hon. Win G. Knoch, Circuit Judge.
Hon. Latham Castle, Circuit Judge.

No. 13517

Harris Truck Lines, Inc.,
Plaintiff-Appellant,

vs.

Cherry Meat Packers, Inc.
Defendant-Appellee.

} Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that plaintiff's appeal from the judgment of the said District Court in this cause be, and the same is hereby Dismissed, and that the costs be assessed against the defendant-appellee, in accordance with the opinion of this Court filed this day.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

Chicago 10, Illinois.

Thursday, June 21, 1962.

Before:

Hon. F. Ryan Duffy, Circuit Judge.
Hon. Win G. Knoch, Circuit Judge.
Hon. Latham Castle, Circuit Judge.

No. 13517
Harris Truck Lines, Inc.,
Plaintiff-Appellant.
vs.
Cherry Meat Packers, Inc.
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS ORDERED by the Court that the petition of plaintiff-appellant for a rehearing of this cause be, and the same is hereby, DENIED.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

Chicago 10, Illinois.

Wednesday, January 31, 1962.

Before:

Hon. Latham Castle, Circuit Judge.

No. 13517

Harris Truck Lines, Inc.,
Plaintiff-Appellant.

vs.

Cherry Meat Packers, Inc.
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

On consideration of the motion of defendant-appellee to dismiss appeal, the answer of plaintiff-appellant to said motion, and briefs of the parties,

IT IS HEREBY ORDERED that the said motion to dismiss appeal be, and the same is hereby denied.

IT IS FURTHER ORDERED that the request of plaintiff-appellant that the defendant-appellee be ordered to file its brief on the merits be granted, and defendant-appellee is hereby ordered to file its brief on the merits within thirty (30) days from this date.

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

• • (Caption—No. 57 C 659) • •

Transcript of Proceedings had at the hearing of the above-entitled cause before the Hon. Julius J. Hoffman, one of the judges of said court, sitting in his court room in the United States Court House at Chicago, Illinois on the 13th day of July, 1961 at the hour of 10:00 o'clock a.m.

Present:

Mr. Kelly,
Mr. McKay.

The Clerk: 57 C 659, Harris *vs.* Cherry Meat Packers, motion to extend time to file notice of appeal.

Mr. McKay: Good morning Judge. We represent the plaintiff, Harris Truck Line, and this is the only matter we have ever had from Harris Truck Lines. It was sent to us by Jack Oliver Goldsmith, a Los Angeles attorney. Judge LaBuy found against the plaintiff-counter defendant, and we advised Mr. Goldsmith of that. Then we filed a motion for new trial, and before the denial of Judge LaBuy on our motion for new trial, Mr. Goldsmith went on a vacation to Mexico.

The Court: If I may interrupt, is there any objection to this, Mr. Kelly?

Mr. Kelly: Reluctantly, for these reasons—

The Court: Then I must hear you, counsel. I thought perhaps—

Mr. Kelly: Ordinarily I wouldn't.

The Court: All counsel has to do is go down to the second floor and file notice of appeal. It doesn't require any great amount of effort.

Mr. McKay: On this one, if the Court please, I think all sides would like to have a supersedeas bond filed, and I think there is far more chance if there is this extension.

The Court: How long do you want?

Mr. McKay: 30 days.

Mr. Kelly: If your Honor is disposed to give it to him, the only thing I wanted to point out to you is that this cause is a 1957 case. Last March, after submission of briefs, reply briefs, and the like, Judge LaBuy entered judgment for us on our counter claim. There was a motion for new trial and because his Honor was away, it was entered and continued, and Judge LaBuy on June 28th denied his motion.

He comes in now on the idea that Jack Oliver Goldsmith, a co-counsel from Los Angeles, whose appearance is not on file, says that he went on a vacation and didn't know anything about this thing. My position is, under Rule 73(a) of the Federal Rules of Civil Procedure, it says in part as follows:

1. Upon a showing—

The Court: I will extend the time two weeks; the time for the plaintiff-counter defendant to file notice of appeal will be extended to and including July 27th.

Mr. Kelly: His time expires on July 28th, so I presume he wants two weeks.

The Court: You want two weeks beyond that?

Mr. McKay: Yes, because we have to get this bond back and forth.

The Court: What bond was fixed?

Mr. Kelly: No bond.

Mr. McKay: No bond. It would be about $15,000.

Mr. Kelly: The judgment was for $11,000.

The Court: You want two weeks beyond that?

I am sympathetic to Mr. Kelly's position.

Mr. McKay: So am I.

The Court: These old cases—This case is an old case. It took four years to get to trial. We have got to dispose of business here. We don't like to have old cases—at least I don't.

Since you are asking for two weeks beyond the 28th, that will take you to August 11th.

Mr. McKay: Yes, sir.

The Court: All right.

IN THE UNITED STATES DISTRICT COURT
(Caption—No. 57 C 659)

CERTIFICATE

I hereby certify that the above and foregoing transcript, pages 1 to 4, inclusive, is a full, true and accurate transcription of my original shorthand notes taken on the hearing of the above-entitled cause before Judge Julius J. Hoffman on July 13, 1961 at 10:00 o'clock a.m.

/s/ DOROTHY L. BRACKENBURY
Dorothy L. Brackenbury,
Official Court Reporter, United States District Court, Northern District of Illinois.

Dated: March 22, 1962

APPENDIX C.

Affidavit of Harold Mendenhall.

STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES, } ss.

AFFIDAVIT.

HAROLD MENDENHALL, having first been duly sworn under oath deposes and states as follows:

At all times mentioned herein he has been the Vice President of Harris Truck Lines, Inc., and due to the absence from the State of California of the President, during most of 1961 he has been in charge of the affairs of Harris Truck Lines, Inc., during 1961; that all during the year 1961 the general counsel of Harris Truck Lines, Inc., Jack Oliver Goldsmith, was delegated unfettered discretion by said corporation to make all policy determinations on matters which were or might be litigated and in which Harris Truck Lines would or might be involved, including litigation then pending with Cherry Meat Packers, Inc.; that said Goldsmith had been delegated full authority to sue or to order suits filed, to settle or compromise claims, to retain trial counsel of his choosing, to order appeals or direct any other legal steps connected with any such litigation in any action involving Harris Truck Lines, Inc.; that said Goldsmith was to act as agent and attorney in fact for Harris Truck Lines in all matters involving litigation and all other matters pertaining to said corporation during all of 1961.

During 1961, Harris Truck Lines, Inc. conducted no business, had no office, had no employees, had no telephone,

and was engaged in no activity except the winding up of its affairs preparatory to its dissolution; that during all of June, July and August, of 1961 the President of Harris Truck Lines, Inc. was employed by an interstate trucking company and in the performance of his said employment was traveling almost constantly throughout the United States; that during the latter part of June and all of July of 1961 affiant was absent from his office for substantial periods, and affiant had no secretary in his office during that time

Your affiant is informed and believes, and on such information and belief alleges, that on June 28, 1961 and for at least three weeks thereafter said Goldsmith was on a touring vacation in Mexico; that the order extending the time for filing a Notice of Appeal obtained on July 13, 1961 by trial counsel in Chicago was made necessary by the inability of said trial counsel to contact said Goldsmith; that when said Goldsmith returned to Los Angeles after his vacation he notified your affiant of said extension of time for filing the Notice of Appeal granted by the District Court in Chicago, and that shortly thereafter said Goldsmith notified your affiant that he had ordered a Notice of Appeal to be filed within the time provided in that extension; that due to Mr. Goldsmith's absence on vacation during late June and early July of 1961 Harris Truck Lines failed to learn through any other agent or employee of the entry of judgment in the District Court adverse to Harris Truck Lines, Inc., on June 28, 1961.

Further your affiant sayeth not.

HAROLD MENDENHALL.

STATE OF CALIFORNIA, }
COUNTY OF LOS ANGELES, } ss.

HAROLD MENDENHALL, known to me, came before me this 20th day of January, 1962, was duly sworn under oath, stated that the matters set forth in the foregoing Affidavit were true and correct, and signed in my presence this Affidavit at the place indicated.

RAAL E. BUCHEREAU,
Notary Public in and for said County and State.

My Commission expires February 10, 1965.

APPENDIX D.

Affidavit of Jack Oliver Goldsmith.

STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES, } ss.

AFFIDAVIT.

JACK OLIVER GOLDSMITH, having been first duly sworn under oath deposes and states as follows:

He is an attorney licensed to practice law only in the State of California, and is and for a long time has been general counsel of Harris Truck Lines, Inc.; that in his capacity as general counsel he was at all times during the year of 1961 fully responsible and fully authorized to make all corporate decisions with respect to any pending litigation, including litigation pending in Illinois involving Cherry Meat Packers, Inc.; that he had been authorized to order the institution of suit, settle or compromise claims, appoint and dismiss trial counsel, order appeals, and direct any other policy steps connected with any litigation or claim involving Harris Truck Lines, Inc.; that all such responsibility was his and solely his by virtue of authorization from Harris Truck Lines, Inc.

Such delegation of authority to affiant was made necessary by reason of the fact that during all of 1961 Harris Truck Lines, Inc. conducted no business, owned no operating authority, maintained no office, had no employee, had no salaried officer or salaried director, had no quorum of directors resident in the same county and did not have two officers permanently residing in the same county; that Harris Truck Lines sold its only operating authority to

John Seib and Cline Bailey, d b a Shippers Motor Express, and joined in an application with those purchasers for the transfer of said Certificate of Public Convenience and Necessity No. MC-73381, which application was filed with the Interstate Commerce Commission in Washington, D. C. in February of 1960 in Docket No. MC-FC-63011, that said Commission approved said sale and transfer by its order of November 25, 1960, that Harris Truck Lines, Inc. has conducted no business of any nature since 1960; that Harris Truck Lines during all of 1961 was involved only in winding up its affairs and getting ready to dissolve, collecting the purchase price for said operating authority which was paid in installments, and collecting certain other receivables, and discharging its indebtedness, and that affiant as the duly appointed agent and Attorney-in-fact for said truck line collected all of said receivables and supervised the discharge of all liabilities, that affiant was during all of 1961 the only person authorized to endorse or write checks for said corporation, and affiant had absolute control of all monies of Harris Truck Lines then being on deposit in a bank in his name as Trustee.

Your affiant further states that he was on vacation in Mexico on the 28th day of June, 1961 and did not return to his office in Los Angeles or to the United States, until the 20th day of July, 1961; that he then learned for the first time that trial counsel in Chicago had been attempting to contact affiant and had been unsuccessful in doing so because of his touring through Mexico; that upon ordering a review of the court file in the Cherry Meat Packers case affiant learned that an extension of time for the filing of a Notice of Appeal had been obtained from the Court by local trial counsel on July 13, 1961; that relying upon the extension of time so ordered affiant consulted by telephone and letter with additional Chicago counsel concerning the merits of a possible appeal; that upon being advised

by said Chicago counsel, said Chicago counsel was ordered by your affiant to file a Notice of Appeal within the time provided in the order of the District Court entered July 13, 1961.

Your affiant further deposes and states that no agent or officer or employee or attorney of the party-plaintiff with authority to order an appeal of the Cherry Meat Packers litigation had learned of the entry of judgment in the District Court at any time before your affiant was informed of such action after his said return from Mexico; that the 14-day extension granted by the District Court was essential in order to arrive at a proper decision as to whether or not an appeal was warranted; that your affiant firmly and sincerely believes the Harris' position on appeal is soundly supported by the law and the evidence and that a gross miscarriage of justice would result if the subject judgment were not reviewed and the appeal concluded on its merits.

Further your affiant sayeth not.

JACK OLIVER GOLDSMITH.

STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES, } ss.

JACK OLIVER GOLDSMITH, known to me, came before me this 19th day of January, 1962, was duly sworn under oath, stated that the matters set forth in the foregoing Affidavit were true and correct, and signed in my presence this Affidavit at the place indicated.

CICELY McBRIDE,
Notary Public in and for said County and State.

APPENDIX E.

Rule 73(a) of the Federal Rules of Civil Procedure, as amended Dec. 27, 1946, effective March 19, 1948, 28 U. S. C. following § 723c, provides:

> (a) *When and How Taken:* When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be 60 days from such entry, and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed. The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal, fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: granting or denying a motion for judgment under Rule 50(b); or granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59.

Rule 5(b) of the Federal Rules of Civil Procedure, 28 U. S. C. following § 723c, provides:

> (a) *Same. How Made.* Whenever under these rules service is required or permitted to be made upon

a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

Section 6(b) of the Federal Rules of Civil Procedure, as amended Dec. 27, 1946, effective March 19, 1948, 28 U. S. C. following § 723c, provides:

(b) *Enlargement.* When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under rules 25, 50(b), 52(b), 59(b), (d) and (e), 60(b), and 73(a) and (g), except to the extent and under the conditions stated in them.

Section 12(h) of the Federal Rules of Civil Procedure, as amended Dec. 27, 1946, effective March 19, 1948, 28 U. S. C. following § 723c, provides:

(h) *Waiver of Defenses.* A party waives all defenses and objections which he does not present either

by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received.

Rule 52(a) of the Federal Rules of Civil Procedure, as amended Dec. 27, 1946, effective March 19, 1948, 28 U. S. C. following § 723c, provides:

(a) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

Section 1653 of the Judicial Code, 62 Stat. 944, 28 U. S. C. § 1653, provides:

> Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.

Section 2107 of the Judicial Code, 62 Stat. 963 and 63 Stat. 104, 28 U. S. C. § 2107, provides:

> Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.
>
> In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.
>
> In any action, suit or proceeding in admiralty, the notice of appeal shall be filed within ninety days after the entry of the order, judgment or decree appealed from, if it is a final decision, and within fifteen days after its entry if it is an interlocutory decree.
>
> The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree.
>
> This section shall not apply to bankruptcy matters or other proceedings under Title 11.

Office-Supreme Court, U.S.
FILED
NOV 19 1962
JOHN F. DAVIS, CLERK

No. 435

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

HARRIS TRUCK LINES, INC., A Corporation,
Petitioner,

vs.

CHERRY MEAT PACKERS, INC., A Corporation,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

JOHN J. KELLY, JR.
111 West Washington Street
Chicago 2, Illinois
CEntral 6-8386
Attorney for Respondent

The Scheffer Press, Inc., 118 South Clinton Street, Chicago 6, Illinois

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 435

HARRIS TRUCK LINES, INC., A Corporation,
Petitioner,

vs.

CHERRY MEAT PACKERS, INC., A Corporation,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit is now reported at 305 F. 2d 609.

Question Presented

Assuming *arguendo* the existence of a question, a fair statement of it would be whether a District Court has jurisdiction to extend the time for appeal under Rule 73 (a), F.R.C.P., when there was no showing of excusable neglect based on the failure of a party to learn of the entry of a judgment.

STATEMENT

Petitioner's epitomic version of the facts leaves considerable to be said with regard to the background of the case as it appears from the record before the District Court, upon which it granted the challenged extension.

Petitioner, Harris Truck Lines, Inc., filed its Complaint in the U. S. District Court, Northern District of Illinois, against Cherry Meat Packers, Inc., alleging that certain freight charges were due and owing to it as a result of certain shipments. (A. 1-3). Respondent, Cherry Meat Packers, Inc., filed its Answer and Counter-Claim denying the allegations of the Complaint and alleging that Petitioner was negligent in failing to provide "adequate refrigeration" during the transportation of 26040 pounds of meat and claimed damages therefor. After a trial before the Court, without the intervention of a jury, the Court took the case under advisement and requested the respective parties to submit briefs and suggested findings of facts and conclusions of law. The District Court dismissed the Complaint and rendered judgment for defendant on its Counterclaim. Petitioner's timely filed motion for new trial was denied on June 28, 1961. (A. 214)

On July 13, 1961, Judge Hoffman of the District Court, sitting in emergency during the summer recess, upon the unverified motion of Petitioner's attorney of record, and over the objection of the Respondent entered an order extending the time within which Respondent may file a Notice of Appeal to August 11, 1961. (*Appendix B. Petition, pp. 28-30*)

Petitioner filed its Notice of Appeal on the last day of the extended time. (A. 217)

Respondent moved in the Court of Appeals to dismiss Petitioner's appeal pursuant to 15 (f) of the Rules of that Court, predicated on the grounds that (1) the Notice of Appeal was not timely filed and (2) that the order of the District Court entered July 13, 1961 purporting to extend the time within which Petitioner could file its Notice of Appeal was inefficacious because the District Court had no basis for its jurisdiction to extend the time for filing the Notice of Appeal. Petitioner's brief in opposition to the Motion to dismiss the appeal had attached thereto the affidavits of Jack Goldsmith and Harold Mendenhall. (*Appendices C & D Petition pp 31 to 36*) The matters and things therein alleged were not brought to the notice of the District Court at the time of motion for the extension of time. The District Court had before it only an unverified motion of the attorney of record requesting an extension of time within which Petitioner may file its Notice of Appeal "because Jack Oliver Goldsmith, co-counsel in Los Angeles, went on vacation to Mexico before he learned of Judge La Buy's denial of plaintiff's motion for new trial herein, and Mr. Goldsmith will not return to his office until July 21, 1961." (Appendix I, *infra*, p. 1a).

On January 31, 1962, one judge, the Hon. Latham Castle, entered an order denying the motion to dismiss the appeal and ordered respondent to file its brief on the merits in thirty (30) days. (*Appendix A, Petition p. 27.*)

An order denying a motion to dismiss an appeal is not *interlocutory* but final. A quorum is necessary for such a disposition. *28 U.S.C.A. § 46 (a) to (d) Rule 4 (a) and (b); Rules of the United States Court of Appeals for the Seventh Circuit.* Accordingly, at the oral argument, Chief Judge Duffy so advised counsel for petitioner. The judge

ment of the Court of Appeals dismissing the appeal was entered on May 10, 1962. The Petition for rehearing was denied on June 21, 1962. (303 F. 2d 609).

REASONS FOR DENYING CERTIORARI

I.

THE COURT OF APPEALS DECISION IS DISTINCTLY CORRECT.

Where the statutes prescribe the time within which the decisions of a lower court may be appealed, the reviewing courts have appellate jurisdiction over only those causes in which the appeal is perfected within the statutory period.

The Seventh Circuit applied the above principle to the 30 day period permitted by Rule 73(a) in dismissing the appeal in *Ray, et al.* v. *Morris, et al.*, 170 F. 2d 498, holding:

> "To be sure, rules of practice and procedure are devised to promote the ends of justice and should be liberally construed, but the courts have repeatedly held that an appeal is granted to the losing party on condition that he complies with the statute permitting an appeal; that an appellant must be held to have known of the existence of the statute; and that the requirements of the statute are jurisdictional and cannot be avoided. *Mosier* v. *Federal Reserve Bank of New York*, 2 Cir. 132 F 2d 710."

Similarly, in *Marten* v. *Hess, et al.*, 176 F. 2d 834, 835 (6 Cir., 1949), the court relied upon Rule 73 (a) in dismissing an appeal filed after the 30 day period, on the ground that:

> "It is fundamental that the time requirement within which an appeal must be taken is mandatory and

jurisdictional. It cannot be extended by waiver, or order of the court. If notice of appeal is not filed within the time provided, the right to appeal is lost. • • •"

Courts have no power to extend the statutory period within which an appeal may be taken, except insofar as the statute itself may permit them to do so. In *Old Nick Williams Co.* v. *United States*, 215 U.S. 541, an appeal was dismissed on the grounds relied upon by Respondent. This Court holding as follows:

"As Mr. Justice Bradley said in *Credit Company* v. *Arkansas Central Railway*, 128 U.S. 261:

> 'An appeal cannot be said to be "taken" any more than a writ of error can be said to be "brought" until it is, in some way, presented to the court which made the decree appealed from, thereby putting an end to its jurisdiction over the cause, and making it its duty to send it to the appellate court.'

"There the appeal was allowed by Mr. Justice Miller on the last day on which an appeal could be taken (Revised Statues, §1008), but was not presented to the court below nor filed with the clerk until five days after the prescribed time had expired. It was held that the appeal must be dismissed, and Mr. Justice Bradley added:

> 'The attempt made, in this case, to anticipate the actual time of presenting and filing the appeal, by entering an order *nunc pro tunc*, does not help the case. When the time for taking an appeal has expired, it cannot be arrested or called back by a simple order of court. If it could be, the law which limits the time within which an appeal can be taken would be a dead letter.'"

• • •

"The delay in the present case in taking out the writ of error was not the act of the court, but of

> plaintiff in error. At all events, plaintiff in error might have brought its writ of error within the time prescribed by statute, and the court had no power to allow it after the time limited had expired."

In *Deena Products Co. v. United Brick & Clay Workers of America, et al.*, 195 F. 2d 612, 613 (6 Cir., 1952) the District Court had attempted to allow more time than the 30 days authorized by Rule 73 (a) for perfection of the appeal, but the Court of Appeals held that it had no jurisdiction, stating:

> "• • • it appears that this court has no jurisdiction to entertain the appeal, for the reason that the appellant company failed to file a notice of appeal in the United States District Court within the time prescribed by law and by the Rules of Civil Procedure, inasmuch as more than thirty days had elapsed after the motion of appellant for a new trial had been overruled by the District Court before the appellant's motion for a new trial was reinstated and again overruled, the District Judge having stated that his purpose in setting aside the original order overruling the motion for a new trial was to enable the plaintiff to prosecute an appeal;
>
> "And it being the view of this court that, both under Civil Procedure Rule 73 (a), 28 U.S.C.A., and section 2107 of Title 28 U.S.C., as amended by Act of Congress of May 24, 1949, the filing of a notice of appeal within the prescribed time is mandatory and jurisdictional and cannot be extended by waiver or order of court, and the right to appeal is lost if notice of appeal is not filed within the time prescribed."

In *Howard v. Local 74, Etc.*, 208 F. 2d 930, the facts were these.

The defendants-appellees moved to dismiss the appeal on the ground (among another) that plaintiffs' notice of

appeal filed pursuant to an order of the District Court was "inefficacious because the court had no jurisdiction to extend the time for filing such notice."

The plaintiffs had brought their action on behalf of themselves and others similarly situated seeking injunctive and other relief against an alleged conspiracy of defendants in violation of the Sherman Anti-Trust Act. The complaint was dismissed on July 20, 1953. Plaintiffs filed a Notice of Appeal from the Order of Dismissal on August 21, 1953, thirty-two (32) days after entry of the judgment. Thereafter plaintiffs filed a Motion with the trial Court for leave to withdraw their Notice of Appeal previously filed and for an extension of time for filing another Notice of Appeal to September 16, 1953. On the latter date, plaintiffs' Motion was granted, the original Notice of Appeal withdrawn and a second Notice of Appeal filed. The only question before the Court was whether the Court below had jurisdiction to enter the Order of September 16th. The late Judge Lindley, speaking for the Court in dismissing the appeal, stated at Page 932:

> "Thus, it is clear that a lower Court has jurisdiction to extend the time for appeal only if a basis for that jurisdication is found within the express provisions of Rule 73 (a); *viz.*, a showing of "excusable neglect based on a failure" of a party to learn of the entry of the judgment. The Courts have repeatedly held that compliance with the requirements of a Statute permitting an appeal is jurisdictional, and that an extension of time may be granted only on satisfaction of the statutory provisions therefor (citing cases). As the Court of Appeals for the Sixth Circuit said in *Marten* v. *Hess*, 176, F. 2d 834, at page 835, "It is fundamental that the time requirement within which an appeal must be taken is mandatory and jurisdictional. It can not be extended by waiver, or order of the Court. If notice of appeal is not filed within the time provided, the right to appeal is lost."

Upon the question of "a showing of excusable neglect of a party" the court stated at page 933:

> "As previously noted, a lower court may not extend the statutory time for taking an appeal, except insofar as the statute itself empowers it to do so and an extension is permissible under Rule 73 (a) on a showing of "excusable neglect" only. No such showing was made here. • • •
>
> Furthermore, the record discloses no failure of any interested party to receive notice of the entry of the order dismissing this complaint. Rule 77 (d) requires the clerk to serve notice of the entry of an order or judgment, by mail, on all parties not in default by failure to appear. A docket entry of July 20, 1953, by the Clerk of the Court below, establishes the fact that notice of the judgment of that date was mailed to plaintiffs' counsel on July 21st, which, under the provisions of Rule 5, is tantamount to service on plaintiffs. • • • (citing case.)
>
> • • • Under Rule 5 notice to counsel is notice to all parties represented by him.
>
> For the foregoing reasons, we hold that no "excusable neglect," within the exception provided in Rule 73 (a), is shown and that the appeal should be dismissed for want of jurisdiction."

There is only one ground upon which a District Court may rely in extending the time for notice of appeal, and that is "excusable neglect based on a failure of a party to learn of the entry of the judgment." (Rule 73 (a)). The cases applying the plain language of Rule 73 (a) hold that only "failure of a party to learn of the entry of the judgment" will be accepted as the basis for extending time to appeal. *Howard* v. *Local 74, Et* ., 208 F. 2d 930 (7 Cir., 1953); *Brainard* v. *Joy Mfg. Co.*, 9 FRD 625 (M.D. Ohio, 1949); *Creedon* v. *Smith*, 8 FRD 162 (N.D. Ohio,

1948); *Felton* v. *Florida East Coast Ry. Co.*, 8 FRD 232 (S.D. N.Y. 1948). See also *Waddell* v. *Chicago Land Clearance Commission*, 206 F. 2d 748 (7 Cir. 1953); *Wagoner* v. *Fairview Consolidated School District No. 5*, 289 F. 2d 480 (10 Cir., 1961) and *Edwards* v. *Doctors Hospital*, 242 F. 2d 888 (2 Cir., 1957).

Rule 77 (d) requires the District Court Clerk immediately to mail notice of the entry of every judgment to "every party affected thereby" and to make a note in the docket of the mailing. This was done in this case, as the Petitioner admits. (Petition; p. 4)

Clearly, therefore, the order of July 13, 1961 went beyond the jurisdiction of the District Court, insofar as it purported to authorize petitioner who had learned of the entry of the order denying the motion for new trial in ample time, to file a notice of appeal more than thirty days after the final judgment was entered.

Rule 77 (d) FRCP provides in part as follows:

> "• • • *Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 73 (a).*"

Rule 5, referred to in Rule 77 (d), includes the following provision:

> "Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the Court."

Clearly, therefore, the fact, that the District Court clerk mailed copies of the June 28, 1961 order to Petitioner's

counsel of record is determinative that Petitioner had knowledge of that order, there being nothing in the record to the contrary. *North Umberland Mining Co.* v. *Standard Acc. Ins. Co.*, 193 F. 2d 951 (9 Cir. 1952).

Petitioner was represented by counsel, and the clerk mailed notice of the order entered on June 28, 1961 to him on June 28, 1961. There could not have been a failure of a party to receive notice of the order, within the meaning of the Rules. Accordingly, the District Court had no power under Rule 73 (a) to extend petitioner's time to file its notice of appeal. With this the Court below agreed.

Petitioner's plaint about liberal construction of the Federal Rules of Civil Procedure is adequately answered in a very recent unreported case.

Chief Judge Biggs, in dismissing an appeal for lack of jurisdiction in *Plant Economy Inc.* v. *Mirror Insulation Co., Inc.* (3 Cir.) 308 Fed. 2d 275, 278, stated pertinently:—

> "We recognize that the Federal Rules of Civil Procedure must be construed liberally to bring about a just, speedy and inexpensive determination of every action. Any requirement of compliance with barren technical formalities is to be avoided. But it cannot be denied that certain formalities are indispensable if litigation is to be just, speedy and inexpensive. This fundamental and most important objective can be achieved only by adherence to rather than rejection of the rules . . .
>
> Since notice of appeal was not filed until after the expiration of thirty days from the entry of the judgment appealed from, and no *effective* action was taken in the Court below to extend the appeal period, we do not possess the power to entertain the appeal."

Petitioner contends "that the District Court has a broader discretion in granting such motions for extension during the period initially prescribed for filing the Notice of

Appeal than it does after the expiration of the 30 day period for filing a Notice of Appeal. This same distinction is made by Rule 6(b), F.R. Civ. P." (Petition p. 11)

Rule 6(b) itself and the decisions of Courts are to the contrary.

The time limitation for perfecting an appeal is expressly excluded from the general provisions of Rule 6(b) for enlargement of time "for cause shown" for actions "required or allowed to be done" within an express time limitation set by the Federal Rules or by order of a Court. *Howard v. Local 74, etc.*, 208 F. 2d 930, 932.

II.

THERE ARE NO SPECIAL AND IMPORTANT REASONS FOR GRANTING THE WRIT.

Rule 19 (1) of this Court states emphatically that a review is not a matter of right but of sound judicial discretion and will be granted only where there are special and important reasons therefor. Special and important reasons imply a reach to a problem beyond the academic or the episodic. *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74.

Certiorari, if granted here, would be for the sole interest of petitioner and would be an imposition, we believe, on this Court's time for consideration of those classes of cases the adjudication of which is this Court's chief function.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN J. KELLY, JR.,
Attorney for Respondent.

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
For The Northern District of Illinois
Eastern Division

HARRIS TRUCK LINE, INC.,
Plaintiff.
vs.
CHERRY MEAT PACKERS, INC.,
Defendant.
No. 57 C 659

MOTION.

(Filed July 13, 1961)

Now comes plaintiff, Harris Truck Line, Inc., and moves this court to extend to Monday, August 28, 1961, the time within which plaintiff may file its Notice of Appeal. This extension is requested because Jack Oliver Goldsmith, co-counsel in Los Angeles, went on vacation to Mexico before he learned of Judge LaBuy's denial of plaintiff's motion for new trial herein, and Mr. Goldsmith will not return to his office until July 21, 1961.

Harris Truck Line, Inc.,
By: /s/ Donald MacKay
Donald MacKay,
Its Attorney.

Petit, Olin, Overmeyer and Fazio
111 West Monroe Street,
Chicago 3, Illinois
RAndolph 6-1025.

Office Supreme Court, U.S.
FILED
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 435

HARRIS TRUCK LINES, INC., A CORPORATION,
Petitioner,

vs.

CHERRY MEAT PACKERS, INC., A CORPORATION,
Respondent.

REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

HARLAN L. HACKERT,
EUGENE H. RUARK,
208 South LaSalle Street,
Chicago 4, Illinois,
JOSEPH E. BELL,
105 South LaSalle Street,
Chicago 3, Illinois,
Attorneys for Petitioner.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

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HARRIS TRUCK LINES, INC., A CORPORATION,
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REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

This reply is impelled by Petitioner's belief that Respondent's brief has not reached the real issues of this case, but rather attacked matters largely collateral.

I. The Issue Is the Validity of an Extension Granted by the District Court Under Rule 73(a), F. R. Civ. P. Within the Original Appeal Period, Not Whether Filing a Notice of Appeal May Be Initiated After the Appeal Period Has Expired.

Petitioner, in its petition for a writ of certiorari, sought to make clear that the issue here is whether an extension of time for filing the notice of appeal granted within the

thirty-day period in which notice of appeal may be filed as a matter of right should be judged by the same standards as an extension granted after the time for filing a notice of appeal as a matter of right has expired. Petitioner believes that the situations are basically different because an attorney, failing to receive an extension of time during the original 30-day appeal period, may then protect his client by filing a notice of appeal of right and without order of court (although he may lack authority to do so). Petitioner relied on the validity of an extension granted within the original appeal period and filed its notice of appeal only within the time granted by the extension.

The cases cited by Respondent on the issue fall into two categories: those in which no extension of time to appeal under Rule 73(a) is involved and those in which the request for extension of time was made after the period for appeal of right had expired. The only attempt to meet Petitioner's argument is the flat statement that "Rule 6(b) itself and the decisions of Courts are to the contrary." (Brief in Opposition p. 11.) The force of this contention is somewhat vitiated by the total absence of any supporting authority. Had Respondent sought authority on the issue, it might, in addition to the cases contrary to its position cited by Petitioner, have referred to *Plant Economy, Inc.* v. *Mirror Insulation Co., Inc.*, 308 F. 2d 275 (3d Cir. Nov. 12, 1962), cited by Respondent only two paragraphs earlier. There Chief Judge Biggs stated pointedly:

> "An extension of time for the taking of an appeal, granted *ex parte* after the expiration of the original appeal period, is inconsistent with provisions of Rule 6(b) and Rule 6(d). Before the expiration of the original thirty-day period, the court could have extended the appeal period with or without motion or notice. But since no order extending the appeal period was made until after the thirty-day period had expired, the court was without authority to act *ex parte*. This

was the conclusion reached in North Umberland Mining Co. v. Standard Acc. Ins. Co., 193 F. 2d 951, 952 (9th Cir. 1952) based upon reasons which appear to us to be unassailable."

It might also be noted that Petitioner also cited on this question the opinion of the Tenth Circuit in *Cohen v. Plateau Natural Gas Co.*, 303 F. 2d 273 (10th Cir. May 1, 1962). Certiorari was denied in this case on October 8, 1962. The cases cited by Petitioner as well as Respondent's apparent inability to find support for his contrary assertion (for which we believe none is available), make it crystal-clear that there is a distinction between extensions of time for the taking of an appeal granted before and after the original appeal period. This distinction required the Court of Appeals to give substantial weight to the district judge's ruling which it failed to do.

II. Compliance With Rule 77(d) Does Not Make Rule 73(a) Inapplicable.

Respondent argues that since the notice required by Rule 77(d) was admittedly received by Petitioner's attorney, Rule 73(a) can have no application. (Brief in Opposition pp. 9, 10.) Such a view would, in effect, write Rule 73(a) out of the Federal Rules of Civil Procedure. Rule 77(d) provides only that failure to send a notice does not affect the time for appeal unless the party failed otherwise to learn of the entry of judgment. It would be an unwarranted extension of the Rule to conclude that this negative language also means that if a clerk's notice is received by the party's attorney, there can be no application of Rule 73(a), even though the party itself does not learn of the entry of judgment. Such a construction would make no distinction between notice of the entry of judgment and learning of the entry of judgment, although there are obvious differences between receipt by the at-

torney of notice of the entry of judgment and communicating this notice to the party in order that the party may make the decision whether to appeal. The party must determine whether an appeal is to be taken and this court should not sanction a construction which would require an attorney to act without authority in order to protect his client.

III. This Case Raises Important Issues Which Should Be Decided by This Court.

Respondent's second and final point is that there are no special and important reasons for granting the writ of certiorari. It would, indeed, be strange if Respondent argued differently. More forbearance than Petitioner possesses would be required for it to refrain from pointing out that it was not always thus. In its brief to the Court of Appeals, following Judge Castle's denial of its motion to dismiss the appeal, Respondent urged that the issue of the extension of time for appeal "raised an important question of practice and procedure going beyond the fortunes of this particular case." Petitioner agrees that it was an important question then and is now.

CONCLUSION.

For the foregoing reasons the writ of certiorari should be granted.

Respectfully submitted.

HARLAN L. HACKBERT,
EUGENE H. RUARK,
208 South LaSalle Street,
Chicago 4, Illinois.

JOSEPH E. BELL,
105 South LaSalle Street,
Chicago 3, Illinois,
Attorneys for Petitioner.